REESE LLP

Via CM/ECF August 17, 2016

Honorable Marilyn D. Go
United States Magistrate Judge
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: *Worth v. CVS Pharmacy, Inc.*, No. 16-cv-00498-FB-MDG (E.D.N.Y.)
Aliano v. CVS Pharmacy, Inc., No. 2:16-cv-02624-FB-MDG (E.D.N.Y.)

Dear Judge Go,

My firm, along with co-counsel, represents the plaintiffs in *Worth v. CVS Pharmacy, Inc.*, No. 2:16-cv-00498-FB-MDG and the intervening plaintiffs in *Aliano v. CVS Pharmacy, Inc.*, No. 2:16-cv-02624-FB-MDG.

We submit the following in reply to the Response of Defendant (Dkt. 54) to our earlier submission regarding the grave deficiencies of Defendant's Class Action Fairness Act ("CAFA") notice.

Defendant's Response underscores its utter disregard for process and, more generally, the inadequacy of its attempt, in conjunction with the Zimmerman Law Offices, to ram through a class settlement in the context of a reverse auction with a copy-cat, serial plaintiff. Indeed, Defendant Reply's is long on hollow excuse but short on recognition of plain fact – its CAFA notice is deficient and, as a result, regardless of all the substantive and other procedural deficiencies in the proposed agreement to be catalogued by the *Worth* plaintiffs presently, there can be no valid class settlement hearing (or approval) here until that is remedied. Moreover, such remedy must take place now, as the statute makes clear that the filing deadline for the CAFA notice must be made with 10 days of the filing of the proposed settlement.

At issue here is a proposed amended class action complaint that Defendant and the Zimmerman Law Offices filed with the Court on June 30, 2016. (Dkt. 42). This amended settlement agreement reflected material changes based on Your Honor's discussion with the parties at a settlement conference held on June 21, 2016. *See* June 21, 2016 Minute Order ("The parties in Aliano advise that they intend to amend the pending motion for preliminary approval to reflect revisions to the settlement agreement.").

Defendant now admits that it never served any notice of the proposed amended settlement filed on June 30, 2016 on state and federal regulators as required by 28 U.S.C. § 1715. To fail to serve notice of a proposed class settlement and its terms, the briefing and objection schedule, with notice the court in which it is pending (such that the full history can be accessed), *is not a mere technicality* that can be excused. Further, co-counsel the Center for Science in the Public Interest, has good reason to believe that one or more states Attorney Generals would respond to proper notice.

This lack of requisite notice defeats the class settlement as a matter of law, because under 28 U.S.C. § 1715, the settlement cannot be binding on proposed class members—it would only bind a single person - Mr. Aliano.

A few key points deserve reiteration following Defendant's opposition:

- The settlement proposed on May 2, 2016 is *not* the same settlement now before Your Honor for consideration. It has been altered *materially* based on settlement discussions counsel had with Your Honor on June 21, 2016.

- The date of the notice relied upon by Defendant of the other settlement was May 11, 2016. That notice states that the case is pending before the Honorable Sharon Johnson Coleman of the Northern District of Illinois. The instant settlement, however, is obviously not pending before Judge Coleman, as Defendant is well aware having been defeated and transferred back to Your Honor. So that outdated and mismatched "notice" could not possibly serve as notice of the current processes, and more, is rife with incorrect and misleading information.

- As Defendant critically concedes, even the other notice failed to include the requisite "names of class members who reside in each State and the estimated proportionate share of the claims of such members to the entire settlement to that State's appropriate State official." 28 U.S.C. § 1715(b)(7)(A). To be clear, inclusion of such information is entirely feasible: Defendant's proposed notice plan turns on the very fact that it has the names and addresses of a vast majority of the class members in its records. Provision of this information in the notice is not optional under the statute, given the facts presented here.

- Even assuming *arguendo* that Defendant is correct that providing the names of class members would not be feasible (which would be wrong, given that Defendant's proposed notice plan is based upon the fact it has the names of class members in its records), 28 U.S.C. § 1715(b)(7)(B) then requires that the following must be provided: "a reasonable estimate of the number of class members residing in each State and the estimated proportionate share of the claims of such members to the entire settlement". Defendant admits that it also failed to provide this key information.

In sum, it is a waste of the parties and judicial resources to proceed towards a hearing on a motion for preliminary approval when, due to the fatal deficiencies in the current CAFA notice, such a proposed settlement could never bind the class. The efficient and prudent course is for proper CAFA notice to be disseminated before the preliminary approval process continues.

Finally, since this is not the first time undersigned counsel for the *Worth* plaintiffs would have to respond to a motion for preliminary approval in this matter (this would be the fourth time such a motion would be filed by Defendant and the Zimmerman Law Offices to correct mistakes and errors on their behalf), we respectfully request that the Court not require the Worth plaintiffs' objection to the current motion, as it will be mooted by the filing of yet another motion for preliminary approval by the Zimmerman Law Offices and Defendant.[1] Instead, we again respectfully request we be given two weeks to respond once the anticipated amended motion is filed.

Respectfully submitted,

Michael R. Reese

cc: All counsel of record, via CM/ECF

---

[1] We also note that, in conjunction with the abundant evidence in the record of improprieties by *Aliano* counsel, to be supplemented significantly when the *Worth* plaintiffs file their objection to preliminary approval, there is more than a sufficient basis to advance to hearing now the Rule 23(g) motion for appointment of *Worth* counsel as interim lead counsel. To be sure, doing so would advance authentic settlement discussions and, in the end, save substantial resources across-the-board. As well, the *Worth* plaintiffs strenuously oppose filing their objection now in light of the ad hoc, yet woefully inadequate, improvements that Aliano and counsel make each time *Worth* counsel elucidates the flaws in their actions and proposals. It is beyond the time for Worth counsel to be empowered in this action through Federal Civil Procedure Rule23(g) appointment, instead of a recidivist copy-cat lawyer and his stock, serial plaintiff.